

Decision 03-04-053 April 17, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation into NOS COMMUNICATIONS, INC. (U-5251-C), dba International Plus, 011 Communications, Internet Business Association (INETBA), I-Vantage Network Solutions; AFFINITY NETWORK, INC. (U-5299-C), dba QuantumLink Communications and HorizonOne Communications; and the corporate officers of NOS and ANI, to determine whether they have violated the laws, rules, and regulations governing the manner in which California subscribers are solicited, switched from one presubscribed carrier to another, and billed for telephone services.

Investigation 02-05-001
(Filed May 2, 2002)

In the Matter of the Application of Blue Ridge Telecom Systems, LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resold Local Exchange Services Within California.

Application 01-12-013
(Filed December 10, 2001)

ORDER EXTENDING STATUTORY DEADLINE

Public Utilities Code Section 1701.2(d) provides that adjudicatory matters such as this investigation shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the 12-month deadline for resolving the case is May 2, 2003. As indicated by the

procedural history that follows, this investigation is unusual because it has been attended since the beginning by significant uncertainties as to parties and issues. Because of this uncertainty, and the other factors set forth below, we have concluded that the 12-month deadline should be extended.¹

The Allegations in the OII

The OII in this matter alleged that respondents NOS Communications, Inc. (NOS) and Affinity Network, Inc. (ANI), both of which hold certificates of public convenience and necessity (CPCNs) from this Commission, had engaged in deceptive marketing, slamming, and cramming, all of which constitute violations of the Public Utilities Code. The OII generally alleged that respondents engaged in this unlawful conduct in the following manner:

“They solicit new customers, primarily small and medium size businesses, by telemarketing. Respondents' telemarketers represent that telephone service will be charged on a per minute usage basis. However, customers are subsequently charged according to a ‘Total Call Unit’ (TCU) pricing methodology that consists of usage and non-usage charges and [is] not based on cents per minute usage. Determining the TCU charges requires a conversion calculation that few, if any, customers can understand.” (OII, p. 2.)

The OII noted that since 1999, the Commission's Consumer Affairs Branch (CAB) had received over 850 consumer complaints involving NOS or ANI, most

¹ The Order Instituting Investigation (OII) in this matter was issued on May 2, 2002. On May 28, 2002, respondents filed an application for rehearing of the OII, arguing that it unlawfully restricted their right to challenge what they viewed as unreasonable discovery requests. In Decision 02-07-045, we denied the application for rehearing, but modified the OII to make clear that the applicant in Application (A.) 01-12-013, Blue Ridge Telecom Systems LLC, was named as a party to the OII, and that was consolidated with the instant investigation, “because the outcome of this Order will

Footnote continued on next page

determine the fitness of the applicant in A.01-12-013.” *See*, D.02-07-045, *mimeo.* at 7.

of which concerned deceptive marketing, cramming or slamming based on the use of the TCU methodology. The OII also noted that while NOS and ANI claimed their telemarketers disclosed the general terms of the TCU methodology during telemarketing, the complaining consumers contended otherwise:

“Consumers consistently express surprise when they discover their telephone billings are based on TCUs and exceed the per minute usage rates promised by the Respondents’ telemarketing. Consumers complain that they were not informed of the TCUs before they switched to the Respondents and never authorized the TCUs. Those who have reviewed the Respondents’ explanations of the TCU, find it so complicated and indecipherable as to amount to no disclosure or an apparent effort to deceive, hide, or misrepresent the Respondents’ excessive rates.” (*Id.* at 3.)

In addition to respondents’ failure to disclose the terms of the TCU methodology, the OII noted that some customers had complained that after they canceled their service with NOS and ANI, they were subjected to early termination penalties and the re-rating of international calls at much higher rates than those promised by the respondents’ telemarketers. The OII also pointed out that respondents had been the subject of enforcement actions and lawsuits in several states because of the TCU methodology, and that the Federal Communications Commission (FCC) had issued a Notice of Apparent Liability for Forfeiture against respondents due to the TCU.

The OII concluded that respondents’ conduct appeared to violate § 2889.5 of the Public Utilities Code, which requires telephone corporations and their agents to “thoroughly inform the subscriber of the nature and extent of the service being offered.” The OII also alleged that the conduct of respondents’ telemarketers should be deemed to constitute cramming in violation of Pub. Util. Code § 2890:

“[The Consumer Services Division, or CSD] regards as cramming any telephone charges by Respondents that were made following the slamming of a consumer. Additionally, any TCU pricing, re-rating, early termination penalty, low usage penalty, or other billings or penalties undisclosed to a consumer and hence unauthorized, would constitute cramming. When NOS or ANI continued billing consumers even after they terminated the Respondents' service, this is also cramming.” (*Id.* at 6.)

In addition to making NOS, ANI, and the officers of these carriers respondents in the proceeding, the OII directed them to provide CSD with answers to certain data requests within 30 days. Ordering Paragraph (OP) 6 expressly stated that “staff may continue discovery” and would be permitted to supplement its testimony, and OP 5 stated that, by means of a motion, “staff may propose amending the OII to add additional Respondents or to raise additional charges.”

The Prehearing Conference and Respondents' Motion for An Emergency Protective Order

A prehearing conference (PHC) was held on June 21, 2002. The first item of business at the PHC was to rule on an “emergency” motion for a protective order filed by NOS and ANI, which sought to impose significant restrictions on CSD’s use of billing and other customer information, the production of which had been required by the OII. The assigned Administrative Law Judge (ALJ) denied the motion, but only after noting assurances from CSD's counsel that, unless a ruling permitting public disclosure was obtained, the information in question would be treated confidentially. (PHC Transcript, pp. 6-13.)

After ruling on the emergency motion, the ALJ asked for a status report on the other litigation pending against NOS and ANI, and in particular on the status of the proceedings before the FCC and the apparent settlement with the Florida

Attorney General. Respondents' counsel agreed to provide a copy of the NOS and ANI response filed at the FCC, and to provide the Florida settlement agreement to the extent it was a public document. (PHC Tr. 25-29.)²

There was also some discussion of how soon CSD expected to be able to complete its discovery and finalize the allegations and parties in the OII. Counsel for CSD stated that he expected it would take three to four months. (*Id.* at 33-34, 42-43.) Respondents' counsel noted that the consumer complaint files of CAB had not yet been produced for respondents, and that until they were (as had been ordered in other Commission proceedings), respondents would not be able to complete their testimony and prepare for hearing. (*Id.* at 35-42.) Respondents' counsel also expressed frustration that the possibility of additional allegations made the OII a "moving target." (*Id.* at 15-16.) Rather than rule on how many rounds of testimony would be allowed, or setting cut-off dates for raising additional allegations, the ALJ stated that he would defer such rulings and require the parties to submit status reports on their progress in completing discovery and preparing for hearing. (*Id.* at 45-46.)

The final topic at the PHC was a series of motions that respondents' counsel proposed to file to address what he saw as jurisdictional defects in the OII. The first was a motion filed on May 30, 2002 that challenged the propriety of naming the individual officers of NOS and ANI as respondents. The second was a motion to be filed shortly after the PHC challenging the Commission's assertion of jurisdiction over international telephone services, the challenge to be based on the filed rate doctrine and federal preemption. The third was a motion

² In mid-July 2002, respondents' counsel did provide the Florida settlement agreement to the ALJ and counsel for CSD.

concerning the extent of the Commission's power to impose fines and reparations, and whether the sanctions being sought in the OII would really amount to an impermissible award of damages. (PHC Tr. 49-51.)

After some discussion of these motions, during which the ALJ expressed the importance he would attach to a careful discussion of the relevant caselaw, (*id.* at 51-61), the ALJ directed the parties to file two status reports. The first, due July 8, was to deal with CSD's progress in providing the CAB consumer complaint files to respondents. The second, due July 22, 2002, was to deal with CSD's progress in completing its investigation and deciding whether to file a motion adding new allegations to the OII. (*Id.* at 61-62.)

The Parties' Status Reports and Respondents' Further Motions

As ordered, the parties submitted status reports on July 8 and July 24, 2002. In its July 8 report, CPSD³ stated that it had provided respondents with about 460, or approximately 45%, of the total number of CAB complaint files involving NOS and/or ANI. CPSD also stated that it would take up to three months to locate, make copies and deliver the remaining 55% of the files to respondents' counsel. Respondents' report contained similar data, and noted that in view of the representations CPSD had made about when the remaining files could be expected, respondents saw no need for a "meet and confer" session concerning the data requests still outstanding to CPSD.

In its July 24 status report, CPSD stated that it had provided respondents with a few additional CAB files, and reiterated that in about three months' time

³ "CPSD" stands for Consumer Protection and Safety Division. This new name for what had been CSD took effect between the time of the PHC and the due date for the first status reports.

(i.e., by the week of October 21, 2002), “CPSD estimates its discovery will be completed and supplemental declarations of its investigative findings will be available for filing.” In their second status report, respondents indicated that they had not received any further data from CPSD, but they still saw no need for a meet-and-confer session.

In accordance with their counsel’s representations at the PHC, respondents have filed two additional motions going to the scope of the OII. On June 28, 2002, respondents filed a motion to dismiss “any and all claims or causes of action” related to the provision of international telephone services.⁴ The motion was based on two grounds. First, respondents asserted that the services in question are subject to exclusive federal jurisdiction. Second, respondents contended that their charges were consistent with the federal tariffs on file at the FCC, and that under such cases as *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) and *Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998), their marketing practices are immune from Commission challenge under the federal filed rate doctrine.

CPSD responded to this motion on July 15, 2002. In its response, CPSD argued that respondents’ international calling services were an “integral part” of its operations as a competitive local carrier, and that under such decisions as *Day v. AT&T Corp.*, 63 Cal.App.4th 325 (1998) and *Pink Dot, Inc. v. Teleport Communications Group*, 89 Cal.App.4th 407 (2001), the federal filed rate doctrine does not act as a bar to the OII’s claims for cramming, slamming and deceptive

⁴ In addition to certain paragraphs in the OII itself, respondents also moved to strike “consumer interview summaries” and related attachments for 29 of the 187 customer complaints included in staff’s declarations supporting issuance of the OII.

marketing based on Pub. Util. Code §§ 2889.5 and 2890. With the permission of the ALJ, respondents filed a reply to CPSD on August 2, 2002.

Respondents' third motion attacking the scope of the OII was filed on July 15, 2002. In it, respondents contend that under Pub. Util. Code § 2017, the Commission lacks authority to impose fines for violations of Pub. Util. Code §§ 2889.5 and 2890. Moreover, respondents continue, since it is clear that the Commission lacks authority to award damages, the Commission may not circumvent this limitation by characterizing as "reparations" what really are damages. On July 30, 2002, CPSD filed a response arguing that under D.97-10-063 (76 CPUC2d 214) and other cases, the Commission has authority to impose fines for violations of Pub. Util. Code §§ 2889.5 and 2890. Moreover, CPSD continued, the Commission has held that while the one-year statute of limitations in §340 of the Code of Civil Procedure applies to civil actions, it does not apply to administrative actions such as Commission proceedings. On August 14, 2002, with the permission of the ALJ, respondents filed a reply to CPSD.

Since the filing of these motions and status reports in July and August 2002, there have been no further filings or rulings in this case.

Discussion

Due largely to the uncertainties that have attended this investigation since the OII was issued, it is clear that the 12-month deadline set forth in Pub. Util. Code § 1701.2(d) cannot be met. Despite CPSD's representations that its discovery would be complete and that supplemental declarations would be ready for filing by late October 2002, CPSD has neither submitted such declarations nor filed a motion to amend the OII or add parties, nor has it stated that it is prepared to stand on the OII's existing allegations. Moreover, the ALJ has not yet ruled on

the jurisdictional issues presented in respondents' motions. Under these circumstances, the appropriate course of action is to extend the 12-month deadline and take steps to ensure that this proceeding is either brought to hearing or settled within a reasonable period of time.

Accordingly, we will direct the ALJ to hold another PHC within 90 days after the mailing date of this order. If CPSD states that its discovery is complete, the ALJ should set deadlines for the submission of any supplemental CPSD testimony and the filing of any motion to amend the OII or add parties. If CPSD states that its discovery is not complete, the ALJ should set deadlines by which CPSD must complete its discovery and announce whether it will file a motion to amend the OII. The ALJ shall have full discretion to require the parties to submit written statements prior to the PHC on all of these issues. Depending on how the discussion at the PHC goes, the ALJ may also deem it appropriate to set deadlines for the submission of respondents' testimony, and to determine on what schedule any CPSD supplementary testimony should be responded to.

There remains the issue of the three motions respondents have filed concerning the scope of and relief sought in the OII. Unless the parties are prepared to state at or prior to the PHC that they have reached a settlement in this proceeding, ALJ rulings and/or Commission decisions will be necessary on these complex motions. We leave to the ALJ the determination of the order in which these motions should be resolved, if resolution proves necessary. We point out, however, that if the ALJ concludes that any one or more of these motions should be denied, he may dispose of such motion(s) in an ALJ ruling, whereas if he concludes any of the motions should be granted, a proposed Commission decision will be necessary (since each of the motions seeks to

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modify the OII).

Finally, we note one development that would seem relevant to any settlement discussions the parties may undertake. As noted above, one of the issues discussed at the June 21, 2002 PHC was the pendency of enforcement proceedings against NOS and ANI at the FCC. Respondents' counsel noted that they had filed a pleading contesting the conclusions in the Notice of Apparent Liability, but that no action had yet been taken by the FCC. (PHC Tr. 18-19.) We note that on December 20, 2002, the FCC issued an order (FCC 02-334) adopting a consent decree it had entered into with NOS and ANI.⁵ Under the terms of the consent decree, the FCC has agreed to terminate its enforcement proceeding against these respondents, and respondents have agreed to abide by various restrictions on their telemarketing and training practices and to make a voluntary payment of \$1,000,000 to the FCC.

Comments on Draft Decision

Under Rule 77.7(f)(4) of the Commission's Rules of Practice and Procedure, the Commission may waive the otherwise-applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

Findings of Fact

1. The OII in this investigation was issued on May 2, 2002.

⁵ The FCC Order was issued in File No. EB-00-TC-005, and NAL/Acct. No. 200132170011.

2. The 12-month statutory deadline would be May 2, 2003, unless this date is extended pursuant to Pub. Util. Code § 1701.2(d).

3. A PHC was held in this matter on June 21, 2002.

4. At the PHC, counsel for CPSD stated that Commission staff would need an additional three to four months to complete its discovery and prepare any supplemental declarations.

5. At the PHC, respondents' counsel stated that, in addition to the motion he had filed on May 30, 2002 challenging the propriety of naming the officers of NOS and ANI as respondents in this proceeding, he intended to file two other motions going to the scope of or relief sought in the OII.

6. On June 28, 2002, respondents filed a motion seeking to dismiss all claims in the OII relating to the provision of international telephone services. Respondents contend such services are within the exclusive jurisdiction of the FCC, and that because all of their charges to customers have been consistent with tariffs on file at the FCC, their marketing practices are immune from Commission challenge under the federal filed rate doctrine. CPSD has filed a response to this motion, and respondents have filed a reply.

7. On July 15, 2002, respondents filed a motion contending that the Commission lacks authority to impose fines in this proceeding pursuant to Pub. Util. Code § 2107, and that the Commission may not award damages in this proceeding under the guise of reparations. CPSD has filed a response to this motion, and respondents have filed a reply.

8. In a status report filed on July 24, 2002, counsel for CPSD stated that Commission staff would need until late October 2002 to complete its discovery and prepare supplemental declarations.

9. As of the date of this decision, CPSD has neither filed any supplemental declarations nor stated that it wishes to amend the OII or add parties, nor has CPSD stated that it is prepared to stand on the existing allegations in the OII.

10. The ALJ has not yet ruled on the motions described in Findings of Fact Nos. 5, 6, and 7.

Conclusion of Law

The 12-month statutory deadline imposed by Public Utilities Code Section 1701.2(d) cannot be met, and therefore should be extended until this proceeding is resolved.

O R D E R

IT IS ORDERED that:

1. The 12-month statutory deadline in this proceeding, May 2, 2002, is extended until further order.
2. Unless the parties reach a settlement in this proceeding first, the Administrative Law Judge (ALJ) shall hold a prehearing conference (PHC) within 90 days after the mailing date of this decision to consider the issues and establish the deadlines described in the discussion section of this order.

3. Unless the parties reach a settlement in this proceeding first, the ALJ shall proceed to issue rulings or prepare proposed Commission decisions, as the case may be, on the motions described in Findings of Fact Nos. 5, 6 and 7.

This order is effective today.

Dated April 17, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners